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NO. _____

IN THE

Supreme Court of the United States

MRS. ALBERTA GEE, ET AL., *Appellants*

v.

STRACHAN SHIPPING COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Appellees*

PETITION FOR CERTIORARI

PETITION

Now Comes, MRS. ALBERTA GEE, individually and on behalf of her minor children, Rivers Gee and Andrew Gee, Appellants, and files this their petition for writ of certiorari in the above captioned matter and would respectfully show:

(A) The official reports of the opinions delivered in the courts below are to be found in 190 Fed. Sup. 255 and 306 Fed. Sup. 693. Such opinions are appended as provided in sub-paragraph (1) of Rule 23, Supreme Court Rules.

(B) 1. The date of the judgment sought to be reviewed is August 1, 1962, and the date of entry is August 1, 1962.

2. On the 26th of October, 1962 the time of filing petition for writ of certiorari was extended to and including Dec. 29, 1962.

3. The statutory provisions believed to confer jurisdiction on this Court is Rule 23b Supreme Court Rules, 28 U.S.C.A. 1651.

(C) The questions presented for review are:

1. The court applied an improper standard in reviewing the medical and lay evidence and in examining the order entered by the Deputy Commissioner.

2. The courts below exceeded their scope of review under the Longshoremen's and Harbor Workers' Act.

3. The court has improperly interpreted the Longshoremen's and Harbor Workers' Act.

4. The lower courts' decisions are contrary to the decisions of this Court.

5. The lower courts' decisions are contrary to other decisions.

(D) The statutes which the case involves are as follows:

1. Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, C. 509, paragraph 1, 44 Stat. 1424, as amended, 33 U.S.C. p. 901 et seq., 33 U.S.C.A. 901 et seq.

2. Judicial Review of Agency Action, 5 U.S.C. 1009, 5 U.S.C.A. 1009.

(E) Statement of the case:

This is a Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals from an opinion entered August 1, 1962, which sustained the order entered by the United

States District Court for the Southern District of Texas on February 2, 1961, which set aside and enjoined the enforcement of an award by C. D. Calbeck, Deputy Commissioner, Department of Labor, on behalf of the widow and children of Matthew Gee against Strachan Shipping Company and its insurance carrier, Texas Employers' Insurance Association, under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. et seq. The action was brought in the District Court by Strachan and its insurance carrier under Section 21(b) of the Act, 33 U.S.C. 921(b) and thereafter appealed by the Deputy Commissioner and Mrs. Alberta Gee, individually and on behalf of her minor children, Rivers Gee and Andrew Gee, Appellants.

On March 5, 1957, the deceased, for whose death benefits are sought in this case, was employed by Appellee, Strachan, aboard a vessel in the Houston ship channel, a navigable waterway of the United States (R. 51). While Gee was unloading super-phosphate fertilizer from a barge, a considerable amount of the fertilizer was thrown on him when a conveyor belt malfunctioned (R. 52, 73). Gee, a man of sixty at that time, complained to his co-worker that "he was all choked up in his chest", and obtained a "ticket" from his employer's timekeeper which authorized him to see a doctor (R. 52, 53). On March 6, Gee was examined by Dr. John F. Rader, Jr. at the Park View Hospital in Houston (R. 59). Dr. Rader, upon taking a history concerning the incident and after physical examination,[1] diagnosed Gee's trouble as allergic bronchitis caused by a reaction to the fertilizer which the decedent had breathed (R. 60, 61). Triminic, which is an anti-

[1] At this time Dr. Rader could hear rales over the areas of both lungs. (R. 61).

histamine, was prescribed and, Gee was directed to return within three days (R. 62).

On March 9 the decedent was examined again by Dr. Rader, who found him somewhat improved (R. 62). But at the time of a further examination on March 12, Dr. Rader was unable to hear breath sounds on the left side of the chest in front and Gee reported that he was feeling much worse (R. 63). A chest x-ray was ordered and Gee was hospitalized for treatment and observation (R. 64). The x-ray revealed that the right chest was clear, but that the heart was displaced to the right. A left view showed homogenous density throughout, suggesting a residium or effusion (R. 64). Gee remained in the hospital until April 6, during which time further x-rays were made and he was treated for pleurisy with adhesions with the administration of heat, a muscle relaxant drug, and antibiotics (R. 64, 65).

Because he suspected that Gee was suffering from carcinoma of the lung, Dr. Rader referred him to Dr. Tom R. Jones, a specialist in diseases of the heart and lungs (R. 65, 67). On May 8, 1957, Dr. Jones made a thorough examination of Gee and concluded that he had either tuberculosis or carcinoma (R. 94, 95). By tests, tuberculosis was eliminated as the cause of the effusion in the left lung. While Dr. Jones was sure the decedent was suffering from carcinoma, he was unable to prove it definitely by aspiration of fluid from the patient's lung, or by any other means (R. 95). Dr. Jones did conclude, however, that Gee had incurable and inoperable carcinoma (R. 95).

On August 26, Gee was admitted to the Veterans Administration Hospital in Houston, where on September 3

a left scalene node biopsy was performed (R. 88). Tests on a portion of the node confirmed the initial impression of cancer (R. 35, 36). On September 5, Gee was allowed to go home from the hospital on leave of absence (R. 35, 36). He re-entered the hospital on September 29 in an extremely weak and hypotensive condition, and died 5 days later, on October 4, 1957 (R. 36).

He seemed to go downhill from the date of injury until death, Mrs. Gee, p. 57 R. Dr. James C. Jones who testified on behalf of appellants expressed the opinion that the fertilizer incident so masked the true condition of deceased as to hasten his death by at least a few minutes, P. 121 R. and that the fertilizer aggravated his condition, P. 126 R.

After extensive hearings on the claim of Gee's wife and children for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., the Deputy Commissioner found that Gee's death "was the result of the natural and unavoidable progression of the injury and the conditions and ailments that were proximately caused, aggravated or accelerated by the employment" (R. 20). In the words of the Deputy Commissioner "the chain of causation proceeded in a logical and orderly fashion and was direct and continuous from the date of injury to and concluding the day of death" (R. 20). Accordingly, he directed that death benefits and certain burial expenses be paid to Gee's widow and children, as provided for by the Act (R. 23, 24).

The Appellees brought this action in the United States District Court for the Southern District of Texas under

33 U.S.C 921(b) to set aside and enjoin the enforcement by the Deputy Commissioner's award, alleging that there was no substantial evidence in the record considered as a whole to support the Deputy Commissioner's finding that there was a causal relationship between the fertilizer incident of March 5, 1957, and Gee's death on October 4, 1957 of carcinoma of the lung (R. 10-18). After consideration of the pleadings and briefs of the parties and the oral argument of counsel, the District Court set aside the award and enjoined its enforcement (R. 46).

In its opinion of January 18, 1961, the court, while agreeing with the Deputy Commissioner that he is not bound by medical testimony, stated that "such testimony can (not) be airily disregarded on complicated medical issues: (R. 41). Further the court thought that there was a lack of substantial evidence, considering the contrary medical testimony, that the fertilizer incident, contributed in any way to Gee's death (R. 42-44). This appeal followed.

Thereafter on August 1, 1962, the Court of Appeals for the Fifth Circuit, the majority speaking through Judge Jones, upheld the order of the District Court, from which order Judge Hutcheson dissented, this petition for certiorari follows:

(G) Jurisdiction was given to the United States District Court under 33 U.S.C. 921(b).

(H) (1) Both the District Court and the Court of Appeals have applied an improper standard in reviewing the medical and lay evidence and in examining the order entered by the Deputy Commissioner in that each of these courts has required the claimants to carry a burden of

proof heavier than that that would be required for the claimants to carry if their case were to be submitted to a jury, in that they have required the claimants to supply evidence supporting their cause of action by a medical standard rather than a legal standard. The Deputy Commissioner and not the doctors had the sworn obligation to determine the legal causation between the injury complained of and the death and this could not be shifted. See, *Sentilles v. Inter-Caribbean Shipping Corp.* 80 S.Ct. 173, p. 175, 361 U.S. 107, p. 109.

All of the circumstances including the medical testimony is to be taken into consideration, see *Sentilles*, supra.

The courts below have further failed to give heed to 33 U.S.C. 920 where it creates a presumption that the claim comes within the provisions of the Longshoremen's and Harbor Workers' Act. The standard of review adopted by the lower courts required claimants to show by substantial evidence the claim came within the Act when in fact the burden upon appeal was for the respondents to show by substantial evidence that the claim did not come within the Act. See, *Robinson v. Bradshaw*, 206 Fed. 2d 435, p. 348, wherein the statute is quoted: "In the absence of substantial evidence to the contrary it shall be presumed that the claim comes within the provisions of the Act." The effect of Section 920 is that where there is an entire lack of competent evidence such Section controls the results of the hearing under Longshoremen's and Harbor Workers' Act and requires an award of compensation. See, *Del Vecchio v. Bowers*, 296 U.S. 280, p. 286, 56 Sup. Ct. 190, p. 193. If the testimony is subject to different inferences "the Deputy Commissioner and he alone is empowered to draw the inference; his decisions as to the weight of the

evidence may not be disturbed by the courts. See, *Del Vecchio v. Bowers*, 56 Sup. Ct. 190, p. 193, 296 U.S. 280, p. 287, *Crowell v. Benson*, 285 U.S. 22, 46, 52 Sup. Ct. 285, 76 L.Ed. 598. It therefore appears in this cause that unless respondents produce substantial evidence to the effect that the injury asserted by the petitioners to have caused, aggravated or accelerated the death of the deceased, Matthew Gee, did not cause, aggravate or accelerate the death and there was no competent evidence to the contrary and only in that event, see *Del Vecchio v. Bowers* and *Crowell v. Benson*, supra, the inference of the Deputy Commissioner was to be given full weight and was to stand. The Courts are no more free to reweigh the evidence and set aside the award of the Commissioner than they are the findings of a jury. A careful reading of all of the medical evidence relied upon by the courts below in effect showed only that the witnesses were of the opinion that the decedent had a carcinoma of the lungs prior to the incident claimed to have caused his death; that none of them knew the cause of the carcinoma; none of them knew the cause of aggravation or acceleration in growth and none of them knew the cause of the spreading and thereby acceleration of it; and none of them knew the causative effect of the particular incident upon the decedent's health and whether or not the incident made the basis of the claim would or would not have hastened his death by a few minutes, but were merely of the opinion that it would not have. Such opinion based upon a surmise and suspicion in view of the lack of scientific knowledge in the field would have allowed the Deputy Commissioner to have made an award in favor of the respondents had the claimants not offered any evidence whatever.

The matter did not rest here, however, but claimants offered substantial evidence, including the opinion of Dr. James C. Jones, that the injury made the basis of the claim aggravated the pre-existing condition (R. 126) and hastened the death of decedent; that it probably delayed the diagnosis of the carcinoma (R. 119); that in reasonable medical certainty the carcinoma would have been discovered within thirty days of March 5, 1957 (the date of injury), but for the fertilizer incident (R. 120) and that decedent would have received treatment which would have prolonged his life (R. 120-121). And further that "Well, I think if, say, given early diagnosis they could have probably stretched things out two or three months at least", original record P. 312. Not only did claimants offer this testimony, but the testimony of the widow to the effect that the deceased seemingly held his own for approximately a month and seemed to go steadily downhill from the date of injury to the date of death. This testimony of Dr. Jones and the testimony of the widow as well as other evidence offered constituted substantial evidence and it was the Deputy Commissioner's prerogative to take whichever inference from the record which he chose to take. Therefore, the courts below have applied an improper standard in reviewing the medical and lay evidence and in examining the order entered by the Deputy Commissioner and the petition should be granted on such grounds.

(2) The courts below exceeded their scope of review under the Longshoremen's and Harbor Workers' Act in that they reweighed the evidence.

Under the Longshoremen's and Harbor Workers' Act, Section 921(b) if not in accordance with the law the

District Court may suspend or set aside by injunction proceedings the award of the Deputy Commissioner. However, if the award is supported by evidence, then the court does not have the power to set aside the Deputy Commissioner's order. See, *Del Vecchio v. Bowers*, supra. It matters not the District Court, were it deciding the case on its own, would have decided the case differently.

(3) The court has failed to give effect to Section 920 of the Act, see, *Del Vecchio v. Bowers*, supra, in that they have required the claimant to produce evidence of a greater weight than the claimant would be required to produce if the case were one to be determined by a jury, which is improper, see, *Sentilles*, supra, and have refused to give full effect the public policy of the compensation act to the effect compensation acts are to be construed liberally and further have failed to interpret the Act in favor of the employee as required by the public policy of such acts being enacted. See, *Baltimore & Philadelphia Steamboat Company, et al. v. Norton*, 248 U.S. 408, p. 414, 52 Sup. Ct. 187, p. 189. *Robinson v. Bradshaw*, 206 Fed. 2d 435, p. 437, where the Court says:

> ". . . this construction of the statute conforms with the general purpose of compensation law, their remedial character and the liberality with which they are construed, doubts being resolved in favor of the employee or his dependent family. Baltimore & Philadelphia Steamship Company v. Norton, Deputy Commissioner, et al., 1932, 284 U.S. 408, 414, 52 Sup. Ct. 187, 76 L.Ed. 366, Standard Insurance Company v. Hoge, 1933, 62 App. D.C. 245, 247, 66 Fed. 2d 275, 277, Fidelity & Casualty Company of New York v. Burris, 1932, 61 App. D.C. 228, 230, 59 Fed. 2d 1042, 1044, President, etc. of Georgetown College v. Stone, note 2, supra."

(4) The lower courts' decisions are contrary to the decisions of this Court for the reason that they failed to follow *Baltimore & Philadelphia Steamboat Company v. Norton*, interpreting the act liberally in favor of the claimant, and, also, the Court's decision in *Sentilles*, supra, in that it failed to give full effect to the decision of such case. The courts further failed to recognize the implications of *O'Leary v. Brown & Pacific-Maxon, Inc.*, in 71 S.Ct. 470, 340 U.S. 504, in that they have applied common law concepts of causation which are contrary to the spirit of *O'Leary*.

(5) The lower courts' decisions herein are contrary to other decisions, especially that of *Robinson v. Bradshaw*, 206 F.2d 435, p. 438, where the court says:

> "We think it follows that the statutory presumption brings the death within the Act when it results in the course of employment from an illness which has taken a sudden and unusual turn for the worse, not shown by substantial evidence to be unrelated to the employment.";

(I) Appended hereto is a copy of the Decision of the Fifth Circuit Court of Appeals as reported in 306 F.2d 693; a copy of the District Court's opinion appears on pages 32-45 of the record printed for use in the court below and the Order of the Deputy Commissioner on pages 19-24, of such record.

WHEREFORE, premises considered, petitioners pray that the petition for certiorari be granted; that they be granted a hearing herein and that upon final hearing orders of the lower court be set aside; that the cause be reversed and remanded with instructions to reinstate the award of the

Commissioner and that they recover reasonable counsel fees, costs and disbursements in pursuing this matter.

W. ARTHUR COMBS
W. JILES ROBERTS
Attorneys for Petitioners

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari has been served on the Honorable C. A. Brown, Royston, Rayzor & Cook, attorney for Respondents, Strachan Shipping Company and Texas Employers' Insurance Association, by mailing same to him first class postage prepaid properly addressed to him at his office address and that two copies of the same have been served upon the Solicitor General, Department of Justice, Washington 25, D. C., by addressing the same to him at his office and mailing same airmail postage prepaid and two copies of same have been served on the Honorable Woodrow Seals, United States Attorney for the Southern District of Texas at his office in Houston, Texas, by mailing same first class United States mail, postage prepaid, and two copies of same upon the Honorable W. Harold Bigham, Department of Justice, Washington 25, D. C., by mailing same air mail, postage prepaid all on this the 28 day of December, 1962.

W. ARTHUR COMBS
State National Building
Houston 2, Texas

W. JILES ROBERTS
617 Americana Building
Houston 2, Texas
Attorneys for Petitioners

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 19034

C. D. CALBECK, Deputy Labor Commissioner, Eighth Compensation District, and MRS. ALBERTA GEE, Individually and on behalf of her minor children RIVERS GEE and ANDREW GEE,

Appellants,

versus

STRACHAN SHIPPING COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Appellees.

Appeals from the United States District Court for the Southern District of Texas.

(August 1, 1962)

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

JONES, Circuit Judge: The Deputy Labor Commissioner made an award to the widow and children of Matthew Gee under the Longshoremen's and Harbor Workers' Compensa-

tion Act, 33 U.S.C.A. § 901, et seq. The district court reached the conclusion that the award was not supported by substantial evidence on the record as a whole. It set aside the award and the Deputy Commissioner has appealed.

Matthew Gee was a sixty-year-old stevedore. On March 5, 1957, while employed by the appellee, Strachan Shipping Company, he was engaged in the unloading from a vessel to a barge of triple superphosphate fertilizer. The conveyer belt which was moving the fertilizer "choked up" and a quantity of the fertilizer "splattered over" Gee and he stated to a coworker that he was "all choked up in his chest." He went home and complained to his wife about his chest. On the next day Gee visited Dr. J. F. Rader and reported to him that the fertilizer got into his chest, made his chest, eyes and nose hurt, and made his breathing difficult. Dr. Rader believed that Gee's trouble was bronchitis caused by the fertilizer and prescribed an anti-histamine. Gee improved but his condition again worsened. He was X-rayed and hospitalized. The X-ray indicated a residuum or effusion in the left chest.

Dr. Rader, suspecting that Gee had carcinoma of the lung, referred him to Dr. Tom R. Jones, a specialist in diseases of the heart and lungs. Dr. Jones made an examination resulting in a tentative diagnosis of either carcinoma or tuberculosis. Tests were made eliminating the latter. Dr. Jones formed an opinion during the early part of May, 1957, that Gee had a lung carcinoma which was incurable and inoperable. He was also of the opinion that this condition was also present on March 12, 1957, when X-rays had been made. Gee was admitted to a Veterans Hospital in Houston on August 26th, where Dr. Jones' diagnosis was confirmed

by a biopsy. He returned home on September 5th on leave of absence, returned on September 29th, and five days later, on October 4, 1957, died. Compensation benefits were claimed by Gee's widow and children under the Act. The Deputy Commissioner found that Gee's death was proximately caused, aggravated or accelerated by the employment. Benefits, as provided in the Act, were awarded. The employer and its insurance carrier sought a review in the District Court of the Southern District of Texas and prayed for injunctive relief against the enforcement of the Deputy Commissioner's award. The district court granted the relief sought, supporting its decision by a written opinion. *Strachan Shipping Company v. C. D. Calbeck, Deputy Commissioner*, 190 F. Supp. 255. From the final judgment of the district court enjoining the enforcement of the award, the Deputy Commissioner and the widow and children of Gee have appealed.

The question before the district court, as stated and decided by it, was whether there was reliable, probative, and substantial evidence in the record as a whole to support the Deputy Commissioner's finding that the "fertilizer incident" resulted in Gee's permanent disability and caused or accelerated his death. Such is the question before us as it is submitted by the Deputy Commissioner. The Deputy Commissioner states, as the rule by which we should be guided, that an award can be made even though the claim is unsupported by, or is even in conflict with, medical evidence, if there is other evidence tending to establish causation. From this statement of principle the Deputy Commissioner reasons that the sequence of physical events justifies the finding of causation, and states that it is the Deputy Commissioner's task to decide whether the given injury is

to be deemed the legal cause of the given consequence. It is not to be doubted that the findings of triers of fact who reach conclusions contrary to the weight of the medical testimony may be upheld. *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142; *Todd Shipyards Corporation v. Donovan, Deputy Commissioner*, 5th Cir. 1962, 300 F. 2d 741. An injury which hastens an employee's death may be regarded as causing it. *Mississippi Shipping Co. v. Henderson*, 5th Cir. 1956, 231 F. 2d 457.

In the Deputy Commissioner's order there is included in his findings of fact the following statement:

> "The employee's death was the result of the natural and unavoidable progression of the injury and the conditions and the ailments that were proximately caused, aggravated or accelerated by the employment. The injury and death arose out of and in the course of the employment. The chain of causation proceeded in a logical and orderly fashion and was direct and continuous from the day of the injury to and including the day of death."

The uncontroverted fact is that Gee had cancer of the lung which had probably spread to the pleural cavity prior to March 5, 1957, and by that date his condition had progressed to the incurable stage. There is nothing more than surmise and conjecture, there is no substantial evidence, to support a finding that the fertilizer accelerated the growth of the cancer or that the cancerous condition was aggravated by it. If the judgment of the district court is to be reversed and the award of the Deputy Commissioner is to be reinstated, it must be as a result of a determination that

substantial evidence shows that the fertilizer incident masked the cancer and so delayed its diagnosis that treatments were not given which probably would have prolonged Gee's life for a brief period of time. Such is the somewhat narrow question before us.

The review is of the record as a whole, and the administrative order is to be sustained if it appears, upon that review, that substantial evidence supports the findings. *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456; *O'Leary, Deputy Commissioner, v. Brown-Pacific Maxon, Inc.*, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483. Questions of credibility are for the Deputy Commissioner to determine. *National Labor Relations Board v. Walton Manufacturing Co.*, 369 U.S. 904, 82 S.Ct.____, 7 L.Ed.2d 829. The burden of showing that the accident caused an acceleration of the death of the employee was upon the claimant. *Gooding v. Willard*, 2nd Cir. 1954, 209 F.2d 913.

If the whole record has within it the substantial evidence that is required to sustain the finding, that evidence must be found in the testimony of Dr. James G. Jones. He was a specialist in internal medicine and at the time of the hearing had been practicing for a year in the City of Houston. He had never examined Gee and so his testimony was based upon the clinical and hospital records, upon X-rays and upon the hypotheses incorporated in the questions of counsel. The doctor expressed the opinion that the fertilizer masked Gee's true condition and delayed a diagnosis of cancer so that it progressed beyond the stage at which treatment might have been given which probably would have prolonged his life by as much as two or three months. If his life was not prolonged, it can be said that his death

was accelerated. But this is not all that Dr. Jones said in his testimony. The prolongation of Gee's life would probably have resulted if there had been an early diagnosis of cancer. He "guessed" that the pleural effusion, which he opined was masked by the effect of the fertilizer incident, had existed for several weeks prior to the incident. On cross-examination he gave an affirmative answer to this question,

> "And the only thing that you are in a position to say now, as I understand it, is that had it not been for the fertilizer incident, there is a possibility that the cancerous condition would have been discovered at an earlier date and there is then a possibility that his life may have been prolonged possibly two or three months."

Thus that which had been a probability on direct examination became only a possibility on cross-examination. The doctor was further questioned about his opinion as to the prolonging effect of the treatment he would have given. He adhered to his opinion that Gee, if he had been diagnosed as cancerous at an earlier date, and if he had been given the treatments that the doctor would have given, would probably have lived two or three months longer. But this was qualified and, we think, contradicted by the statement that "Well, how long they will go on and how much benefit, of course, nobody can predict."

The opinion testimony of the claimant's expert, Dr. James C. Jones, that the fertilizer hastened the death of Gee, was uncertain and contradictory. It was based upon surmise and conjecture. It was the result of piling presumption upon presumption and drawing inference from inference. We reach the conclusion that this testimony cannot

be regarded as substantial evidence to support the crucial finding that the death was hastened by the fertilizer. Cf. *Whitten v. Liberty Mutual Insurance Company*, 5th Cir. 1958, 257 F.2d 699. The testimony of the doctors who examined Gee was all to the effect that the fertilizer episode neither caused nor aggravated Gee's cancerous condition nor caused or hastened his death. This testimony was considered by the Deputy Commissioner and, it seems, was by him rejected. It need not, therefore, be further discussed by us. If all of the medical testimony be rejected, and perhaps it was rejected by the Deputy Commissioner, we are to inquire as to whether there is other substantial evidence which will warrant the inference drawn by the Deputy Commissioner. *Sentilles v. Inter-Caribbean Corporation*, *supra*; *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. Apart from the testimony of the doctors with respect to the questions of aggravation of the cancer and acceleration of the death, the testimony shows that Gee had an incurable cancer, that he inhaled some of the fertilizer, that this caused a bronchial irritation accompanied by a burning sensation, that Gee died, and that the cancer was the cause of his death. We are urged to say that the proof of these facts constitutes substantial evidence that Gee's death was accelerated by the injury of the fertilizer. The premise may be accepted but the conclusion does not follow. We fail to find substantial evidence of causation that must appear before the claimant can prevail. The district court reached the determination that this substantial evidence was not to be found in the record. We reach the same conclusion. The judgment of the district court is

AFFIRMED.

HUTCHESON, C. J. Dissenting:

A careful consideration of the majority opinion in the light of the record and of the principles governing our review of the decision below, leaves me with the firm conviction that the judgment of the district court should be reversed rather than affirmed.

Without undertaking to set out or discuss the evidence, it is sufficient for me to say that I cannot agree with the majority in its conclusion that the testimony of Dr. Jones, as set out and discussed in the opinion, and the lay testimony in the case taken together do not furnish sufficient basis for the finding of the deputy commissioner. On the contrary, it seems clear to me from the record and from the opinion of the majority itself that the district judge's conclusion and judgment were wrong and that they should be reversed with directions to enter judgment in favor of the deputy commissioner and the widow and children of Gee.

I must, therefore, dissent from the opinion of the majority.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1961

NO. 19034

D. C. Docket No. 12,345 Civil

C. D. CALBECK, Deputy Labor Commissioner, Eighth Compensation District, and MRS. ALBERTA GEE, Individually and on behalf of her minor children RIVERS GEE and ANDREW GEE,

Appellants.

versus

STRACHAN SHIPPING COMPANY and TEXAS EMPLOYERS' INSURANCE ASSOCIATION,

Appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before TUTTLE, Chief Judge, and HUTCHESON and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Hutcheson, Circuit Judge, Dissents."

August 1, 1962

Issued: September, 1962